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## Discretionary Sentencing in Military Commissions: Why and How the Sentencing Guidelines in the Military Commissions Act Should be Changed\*

Brian Wolensky\*\*

### INTRODUCTION

In 2001, during the early days of the “War on Terror,” United States officials captured Salim Ahmed Hamdan, the personal driver and bodyguard of Osama Bin Laden, while he was transporting weapons across the Afghani border.<sup>1</sup> From 2002 until his trial in 2008, Hamdan was classified as an enemy combatant<sup>2</sup> pursuant to the Geneva Convention<sup>3</sup> and detained at

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\* This article was initially written and published when the state of military commissions were in flux. It reflects the events regarding military commissions up to and through April 2009. However, an important decision was made by President Obama in May of 2009. See William Glaberson, *Obama Considers Allowing Please by 9/11 Suspects*, N. Y. TIMES, June 6, 2009, at A1, A12. Obama decided to continue the use of military commissions under a new set of rules which provide more protections for detainees. *Id.* Due to the timing of publication, this decision is not incorporated in this article. Although Obama has decided to continue the military commissions, he has not finalized a set of rules. *Id.* This article serves as a recommendation for changes to the rules of the Military Commissions Act, which Congress and the Obama Administration should consider.

\*\* J.D. candidate 2010, Chapman University School of Law. I would like to thank Professor Kyndra Rotunda for all of her guidance, feedback, and expertise. I would also like to thank the outgoing and incoming Chapman Law Review boards for their excellent work and careful review. Finally, I would like to extend a special thank you to my family and friends for without all of their love, support, guidance, and patience this note would not have been possible.

<sup>1</sup> Although Hamdan was considered a low level player in Al Qaeda, he was fairly involved with the group. See Charge Sheet of Salim Ahmed Hamdan, *United States v. Hamdan* (Feb. 2, 2008), available at <http://www.defenselink.mil/news/d2007Hamdan%20-%20Notification%20of%20Sworn%20Charges.pdf>.

<sup>2</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). “Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.” *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942). The definition of enemy combatants, as described in *Ex parte Quirin*, was reaffirmed by the Supreme Court in 2004. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004). This classification is important because an enemy combatant can be detained until the end of a current conflict, and is subject to trial by military commission. *Id.* at 521. Further, the United States has classified members of the Taliban, al Qaeda, and associated forces as unlawful enemy combatants, and defines an unlawful enemy combatant as “a person who has

Guantanamo Bay. On August 7, 2008, Hamdan was the first Guantanamo detainee convicted by a United States Military Commission—governed by the Military Commissions Act of 2006 (MCA)—for providing material support for terrorism.<sup>4</sup> Hamdan was sentenced to five and a half years in prison. However, the military commission judge granted “administrative credit”<sup>5</sup> for time served since Hamdan’s capture in 2001.<sup>6</sup> As a result, Hamdan only had to serve five additional months.

Hamdan’s case, the first application of the MCA,<sup>7</sup> showed weaknesses in the current military commission system, particularly with regard to sentencing.<sup>8</sup> These weaknesses must be fixed to ensure that detainees will be given a fair trial as commissions go forward.<sup>9</sup> In the words of Thomas Paine, “[h]e that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.”<sup>10</sup>

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engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents.” 10 U.S.C. § 948a (Supp. 2008).

<sup>3</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>4</sup> See William Glaberson, *Panel Sentences Bin Laden Driver to a Short Term*, N.Y. TIMES, Aug. 8, 2008, at A1, available at <http://www.nytimes.com/2008/08/08/washington/08gitmo.html?partner=rssnyt>. Although Hamdan was the first case to be completed by a military commission, in 2007 David Hicks, an Australian detainee, entered a guilty plea and was given a nine month sentence and thus became the first detainee to be released via the MCA. David McFadden, *Gitmo Jury: Life Sentence for Bin Laden Videomaker*, ABC NEWS, Nov. 3, 2008, <http://abcnews.go.com/print?id=6169091> (last visited Mar. 8, 2008).

<sup>5</sup> An administrative credit is the reduction of a sentence by allowing time held to count forward. After administrative credit was granted to Hamdan, the Government challenged the commission’s authority to grant such credit. See Corrected Government Motion for Reconsideration, *United States v. Hamdan* (Sep. 24, 2008), available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/10/us-motion-re-hamdan-sentence-9-24-08.pdf>.

<sup>6</sup> Jerry Markon & Josh White, *Bin Laden Driver Gets 5 1/2 Years; U.S. Sought 30*, WASH. POST, Aug. 8, 2008, at A1.

<sup>7</sup> Although Hamdan was the first case to be completed by a military commission, on November 4, 2008, Ali Hamza Ahmad Suliman al Bahlul was sentenced to life in prison. McFadden, *supra* note 4. Al Bahlul is seen as an extremist who has publicly expressed interest in destroying the United States. See Charge Sheet of Ali Hamza Ahmad Suliman al Bahlul, *United States v. al Bahlul*, (Feb. 8, 2008) [hereinafter Charge Sheet of al Bahlul], available at <http://www.defenselink.mil/news/Feb2008/d20080208bahlul.pdf>. It is interesting to note that the decision did not appear in many newspapers and hardly received national coverage. This could be due to the fact that many people believe al Bahlul belongs in jail for life. However, it is most likely due to the fact that the decision was handed down the day before the 2008 Presidential Election.

<sup>8</sup> One obvious problem that surfaced is whether administrative credit can be granted. See Corrected Government Motion for Reconsideration, *supra* note 5 (“The accused is not entitled to administrative credit because nothing in law or regulation authorizes such credit.”).

<sup>9</sup> See McFadden, *supra* note 4.

<sup>10</sup> THOMAS PAINE, DISSERTATION ON FIRST PRINCIPLES OF GOVERNMENT (1795), reprinted in THE THOMAS PAINE READER 452, 470 (1987).

Amid the growing criticism of the use of military commissions,<sup>11</sup> President Barack Obama issued an Executive Order shutting down Guantanamo Bay and suspending the use of the commissions until their procedures are reviewed and a course of action planned.<sup>12</sup> While shutting down Guantanamo may be viewed as a publicity move,<sup>13</sup> abandoning military commissions and the MCA would be a catastrophic move that could have devastating effects. The MCA is by no means perfect—in fact, as discussed throughout, its sentencing guidelines, among other things, must be changed—however, abandoning the MCA at this point would take the United States back to square one.

In summation, current military commissions and the MCA are not perfect, however, it is the most just system in place and it may not be practical to start anew; therefore, it is crucial to improve the MCA while continuing its use. The sentencing guidelines provided by the MCA, which grant wide discretion to the commissions, is surely an area requiring improvement. The goal of this Comment is to analyze the sentencing guidelines and rules to propose changes that should be made.<sup>14</sup>

Part I of this Comment provides a brief history and description of military commissions and explains where the authority for commissions originated—particularly the United States Constitution,<sup>15</sup> Supreme Court jurisprudence,<sup>16</sup> and the Law of War.<sup>17</sup> Part I further examines the significance of the

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<sup>11</sup> See, e.g., AMERICAN CIVIL LIBERTIES UNION, FACT SHEET: MILITARY COMMISSIONS ACT, available at <http://www.aclu.org/pdfs/legpriorities2007p2.pdf> [hereinafter ACLU FACT SHEET].

<sup>12</sup> Section 3 of the Order deals with the closure of Guantanamo, while Section 7 halts the current military commissions. Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

<sup>13</sup> See Daphne Eviatar, *Why Closing Gitmo Isn't Enough*, WASH. INDEP., Nov. 14, 2008, <http://washingtonindependent.com/18503/why-closing-gitmo-isnt-enough> (providing general objections to Guantanamo Bay) (last visited Mar. 13, 2008). But see Kyndra Miller Rotunda, *Don't Close Gitmo*, WASH. TIMES, June 23, 2008, at A24 (citing numerous reasons why keeping Guantanamo open is the best course of action for the United States).

<sup>14</sup> Although the current state of the MCA and military commissions are in flux, the suggestions in this Comment are applicable to any decision that may be made regarding the commissions. If the commissions are reinstated, or if a new type of court or system is established, this Comment serves as guidance for those commissions or systems as well. Further, as will be discussed below, military commissions have been established in almost every war in American history, thus, this Comment offers sentencing guidance for future commissions.

<sup>15</sup> See U.S. CONST. art. I, § 8, cls. 9, 10.

<sup>16</sup> See generally *Ex parte Quirin*, 317 U.S. 1, 48 (1942) (allowing the President to convene and order trial by military commission); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 634–35 (2006) (finding the military commissions authorized by the President unconstitutional, but inviting Congress to write rules governing military commissions).

<sup>17</sup> The Law of War consists of two components: (1) treaties, conventions, and agreements between countries and (2) custom. See U.S. DEP'T OF DEFENSE REPORT ON

MCA and explains the reasons why the United States must continue to use military commissions.

Part II looks in depth at the MCA, examining the strong congressional intent to provide fair trials to detainees while still preserving United States' national security.<sup>18</sup> Part II also explores the policy reasons behind the sentencing guidelines in the MCA, in particular why such wide degree of discretion was given to the commission with respect to sentencing. Next, Part III describes the problems with the current sentencing guidelines in the MCA, focusing on the problems of (1) administrative credit and (2) excessive commission discretion in sentencing.

Finally, Part IV proposes a solution to the ambiguities in the sentencing guidelines. These changes, if adopted, will provide stability for military commissions, helping to legitimize their use. Further, the changes will ensure that each convicted terrorist is given a fair sentence that is in proportion to the crime committed, while preserving national security.

#### I. A HISTORICAL OVERVIEW AND THE IMPORTANCE OF MILITARY COMMISSIONS

Before probing into any problems the MCA may or may not have, an overview of the military commissions, its evolution and significance is important to understand. This Part will define and provide a brief history and the authority that created the commissions as well as the importance of the MCA and continuation of the military commissions.

##### A. A Brief Background of Military Commissions

Under the MCA, a military commission is a court operated by the military "to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the Law

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THE CONDUCT OF THE PERSIAN GULF WAR, 31 I.L.M. 612, 615 (1992) ("The United States . . . are parties to numerous law of war treaties intended to minimize unnecessary suffering by combatants and noncombatants during war."); U.S. DEP'T OF DEFENSE, DIRECTIVE NO. 2311.01E, LAW OF WAR PROGRAM, sec. 3.1. (May 9, 2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/231101p.pdf> (defining the law of war as "[t]hat part of international law that regulates the conduct of armed hostilities").

<sup>18</sup> See generally 152 Cong. Rec. S10354 (2006). Military Commissions provide: "Judicial guarantees recognized as indispensable by civilized peoples for purposes of common Article 3 of the Geneva Conventions; "Appropriate protection of national security interests; and Protection and safety for all personnel participating in the process, including the accused." U.S. DEP'T OF DEFENSE, FACT SHEET: MILITARY COMMISSIONS (2007), available at <http://www.defenselink.mil/news/Aug2007/OMC%20Fact%20Sheet%20Aug%2007.pdf> [hereinafter U.S. DEP'T OF DEFENSE, FACT SHEET].

of War and other offenses.”<sup>19</sup> Throughout history there have been thousands of combatants subject to rulings by military commissions.<sup>20</sup> However, there is a strong likelihood that many of these combatants did not receive a fair trial because of a desire to quickly punish combatants for their alleged war crimes.<sup>21</sup>

As countries became civilized, military courts evolved. Although not officially dubbed “military commissions,” the first military courts in the United States were established to try a spy immediately following the American Revolution, and then again in 1818 to try two British Indian traders for assisting Native Americans in the Seminole Wars.<sup>22</sup> The actual term “military commission” was not coined until the Mexican-American War in 1847.<sup>23</sup> Over the next century and a half, military commissions developed rapidly and were utilized heavily in the Civil War and both World War I and World War II.<sup>24</sup> In 2001, President Bush issued an executive order instituting military commissions to try those detained as enemy combatants during the War on Terror.<sup>25</sup>

#### 1. Domestic and International Authority: The Constitution and Law of War and the Involvement with the Development of the Military Commission

The Constitution gives Congress the power to create military commissions. It states that Congress has the power to “constitute tribunals inferior to the Supreme Court”<sup>26</sup> and to

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<sup>19</sup> 10 U.S.C. § 948b(a) (Supp. 2008). Military commissions are used rather than civilian courts because, according to President Bush, “the rules for trying enemy combatants in a time of conflict must be different from those for trying common criminals or members of our own military.” News Release, The White House, President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>.

<sup>20</sup> WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 834 (2d ed., rev. & enl., William S. Hein & Co. 2000) (1920) (finding that during the Civil War and Reconstruction there were over 2000 combatants tried by military commission).

<sup>21</sup> MAROUF HASIAN, JR., *IN THE NAME OF NECESSITY: MILITARY TRIBUNALS AND THE LOSS OF AMERICAN CIVIL LIBERTIES* 2 (2005) (claiming that because *foreign* military tribunals violate human rights, do not provide a fair and equal trial, and lack civilian oversight, *our* military commission system also will not be just).

<sup>22</sup> WINTHROP, *supra* note 20, at 832. For a brief description of the history and character of military commissions, including their use in previous wars, see John Yoo, *An Imperial Judiciary at War: Hamdan v. Rumsfeld*, 2006 CATO SUP. CT. REV. 83, 84–99 (2006).

<sup>23</sup> *Id.* (“Assassination, murder, poisoning, rape, or the attempt to commit either, malicious stabbing or maiming, malicious assault and battery, robbery, theft, . . . committed by Mexicans or other civilians in Mexico against individuals of the U.S. military forces . . . should be brought to trial before ‘military commissions.’”).

<sup>24</sup> LEONARD CUTLER, *THE RULE OF LAW AND THE LAW OF WAR: MILITARY COMMISSIONS AND ENEMY COMBATANTS POST 9/11* 4, 7 (2005); Yoo, *supra* note 22, at 91.

<sup>25</sup> Exec. Order No. 01-28904, 66 Fed. Reg. 57833 (Nov. 13, 2001).

<sup>26</sup> U.S. CONST. art. I, § 8, cl. 9.

“define and punish . . . Offences against the Law of Nations.”<sup>27</sup> Further, Congress has the power to “declare War,” and “raise and support Armies.”<sup>28</sup> The Constitution explicitly gave Congress war powers and, as such, “[t]he commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war.”<sup>29</sup>

Although Congress has the power to create military commissions, it must be mindful of international law. The Law of War is the main governing principle that countries must follow during times of conflict.<sup>30</sup> One of the main treaties included in the Law of War is the Third Geneva Convention, which was enacted in 1949 to regulate the treatment of prisoners of war.<sup>31</sup> The Law of War places restrictions on the way certain countries can act during times of war and the United States is bound by it when it establishes and uses military commissions.<sup>32</sup>

## 2. Judicial Authority: Key Supreme Court Decisions and their Consequences on the Evolution of Military Commissions

A major reason for the evolution of military commissions has been the involvement of the United States Supreme Court. Arguably, the most important case was *Ex parte Quirin*, in which a military commission was used to try and convict eight German saboteurs during World War II.<sup>33</sup> The United States Supreme Court held:

By [the President’s] Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.<sup>34</sup>

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<sup>27</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>28</sup> U.S. CONST. art. I, § 8, cls. 11, 12.

<sup>29</sup> WINTHROP, *supra* note 20, at 831.

<sup>30</sup> See U.S. DEPT OF DEFENSE REPORT ON THE CONDUCT OF THE PERSIAN GULF WAR, *supra* note 17; U.S. DEP’T. OF DEFENSE, DIRECTIVE NO. 2311.01E, *supra* note 17.

<sup>31</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>32</sup> See Hamdan v. Rumsfeld, 548 U.S. 557, 625 (2006).

<sup>33</sup> *Ex parte Quirin*, 317 U.S. 1, 21–23 (1942). *Ex parte Quirin* involved facts similar to those surrounding September 11. First, the saboteurs were not wearing uniforms and were thus unidentifiable as combatants. Second, the attacks were planned in the United States. *Id.*

<sup>34</sup> *Id.* at 28.

The Court went on to say that there is a strong presumption that military commissions are constitutional, and there must be a contrary showing before they will be struck down.<sup>35</sup>

Roughly sixty years later, military commissions are again at issue before the Court due to the War on Terror.<sup>36</sup> In *Hamdan v. Rumsfeld*, the Court found the conditions and procedures used by President Bush's military commissions were not valid because, among other things, they violated the Uniform Code of Military Justice.<sup>37</sup> In his concurring opinion, Justice Breyer agreed, stating:

[A]s presently structured, Hamdan's military commission exceeds the bounds Congress has placed on the President's authority in . . . the UCMJ. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided.<sup>38</sup>

However, the Court seemingly invited Congress to rewrite the rules governing military commissions.<sup>39</sup> Congress responded to *Hamdan* by enacting the MCA, which provides detailed procedures on the use of military commissions.<sup>40</sup>

A strong history, the Constitution, and the Supreme Court all provide authority to establish and use military commissions. Currently, military commissions are being used to try detainees in Guantanamo Bay for war crimes. To date, the Court has not ruled on the constitutionality of these military commissions. The first trial by military commission since World War II came to a close in August 2008 when Salim Ahmed Hamdan was convicted of providing material support to terrorism.<sup>41</sup> Because military commissions are finally available and ready to move forward, their use should continue.

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<sup>35</sup> *Id.* at 28. For another Supreme Court case supporting the use of military commissions, see *In re Yamashita*, 327 U.S. 1, 7–8, 25 (1946) (holding that a military court has the jurisdiction to rule on a commander's actions, and their ruling will be given great deference).

<sup>36</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), was one of the first cases before the Supreme Court regarding the War on Terror and the war in Iraq. Although not exclusively dealing with military commissions, the court found that the Government must come up with some criteria in holding enemy combatants, and must give all enemy combatants a chance to be heard. *Id.* at 509. For another current case involving detainees and the War on Terror, see *Rasul v. Bush*, 542 U.S. 466 (2004) (allowing access to federal courts by detainees).

<sup>37</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 634–35 (2006).

<sup>38</sup> *Id.* at 653 (Breyer, J., concurring).

<sup>39</sup> *Id.*

<sup>40</sup> See generally 10 U.S.C. § 948b (Supp. 2008).

<sup>41</sup> Markon & White, *supra* note 6.

## B. The Importance of Continuing to use Military Commissions

As outlined above, the President and Congress have the authority to establish military commissions in certain situations. This section discusses why the use of military commissions should continue in the context of the current War on Terror. President Obama recently stalled the use of military commissions until their procedures can be reviewed.<sup>42</sup> Instead of military commissions, Obama is considering trying detainees in United States federal courts, or setting up a new national security court.<sup>43</sup> This would be a devastating mistake for the United States and its reputation.

First, although military commissions face some systemic problems,<sup>44</sup> they currently provide the only mechanism by which to try suspected enemy combatants. One criticism of the MCA is that it has taken a long time to develop.<sup>45</sup> However, commissions are finally in a position to move forward. Starting a new system will place the United States back to square one and delay the process even longer.<sup>46</sup> The MCA and military commissions were finally moving, and detainees were getting their day in court. Scrapping the MCA and starting with some other new system that will undoubtedly face more delays will simply not promote justice.<sup>47</sup>

Second, there is no other viable option to replace military commissions. Moving to federal court would undoubtedly destroy the heightened national security protections imposed by MCA.<sup>48</sup>

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<sup>42</sup> See Exec. Order No. 13492, 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009).

<sup>43</sup> *Id.*

<sup>44</sup> The American Civil Liberties Union website outlines several perceived problems with military commissions. ACLU FACT SHEET, *supra* note 11. However, many of the comments are overemphasized and were made prior to the application of the MCA. Not all of the problems mentioned by the ACLU are apparent. See Ruling on Motion to Suppress Statements Based on Coercive Interrogation Practices, United States v. Hamdan (July 20, 2008), available at [http://www.defenselink.mil/news/Ruling%20on%20Motion%20to%20Suppress%2029%20and%20D-044%20Ruling%201%20\(2\).pdf](http://www.defenselink.mil/news/Ruling%20on%20Motion%20to%20Suppress%2029%20and%20D-044%20Ruling%201%20(2).pdf).

<sup>45</sup> See Ruling on Motion to Dismiss—Speedy Trial, United States v. Hamdan (July 20, 2008), available at <http://www.defenselink.mil/news/Ruling%20on%20Motion%20to%20Dismiss%20Speedy%20Trial%20D-046.pdf>. It appears that trials have not moved faster because of the difficulty of collecting evidence world-wide and all of the appeals at the federal level that slow the process of military commissions.

<sup>46</sup> In response to the idea of President Obama creating a National Security Court, Ken Gude of the *Guardian* stated: “Any attempt to circumvent a judicial system designed to ensure a fair trial will be met with deserved scorn and would likely lead to additional delays as defendants challenge procedures designed specifically to relax evidentiary standards and restrict defence and public access to classified evidence.” Ken Gude, *Guantanamo's Days are Numbered*, GUARDIAN (England), Nov. 11, 2008, <http://www.guardian.co.uk/commentisfree/cifamerica/2008/nov/11/barack-obama-guantanamo-bay>.

<sup>47</sup> See *id.*

<sup>48</sup> See U.S. DEP'T OF DEFENSE, FACT SHEET, *supra* note 18. But see Ann Woolner,

To protect national security, the MCA allows certain evidence to be considered at trial that would otherwise be excluded by a civilian criminal court.<sup>49</sup> The use of the civilian federal court system will bar certain reliable evidence, and force the United States to turn over highly confidential national security information.<sup>50</sup> Quite simply, for a just outcome with respect to detainees who have expressed their intent to destroy the United States,<sup>51</sup> all *reliable* evidence must be admitted at trial.<sup>52</sup> Therefore, the use of the federal court system to try defendants seriously undermines national security—something that should be a primary goal when dealing with the most dangerous people in the world.

Finally, scrapping the MCA may potentially send the wrong message to the international community. Cutting losses should not be done unnecessarily; if the United States gives up on the MCA it would be prematurely giving up on a set of fixable problems. A simple application of the MCA's evidentiary rules to *Hamdan* demonstrates their effectiveness.<sup>53</sup> Furthermore, it is

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*Fixing Terror Laws No Harder Than Economy*, SEATTLE POST INTELLIGENCER, Dec. 9, 2008, [http://seattlepi.nwsource.com/opinion/391308\\_woolneronline10.html](http://seattlepi.nwsource.com/opinion/391308_woolneronline10.html). Woolner suggests moving detainees to federal courts because a federal judge knows how to deal with coercive evidence and, even if a terrorist is released, it won't matter because the government will monitor him.

<sup>49</sup> See U.S. DEP'T OF DEFENSE, FACT SHEET, *supra* note 18.

<sup>50</sup> Chris Selley argues, despite the occurrence of torture with respect to certain detainees in the past, placing them in American courts would be a mistake because they may not get convicted because of procedural rules—a risk that cannot be taken. Chris Selley, *Give Barack Obama a Chance to Fail on Guantanamo*, NAT'L POST FULL COMMENT, Dec. 16, 2008, <http://network.nationalpost.com/np/blogs/fullcomment/archive/2008/12/16/chris-selley-give-barack-obama-a-chance-to-fail-on-guantanamo.aspx>; see also Yoo, *supra* note 22, at 86–87 (explaining why military commissions should admit more evidence than a federal court).

<sup>51</sup> Many detainees have been quoted as saying, “[i]f I'm let out of here, I will go immediately and start killing Americans again.” Roundtable Press Interview with Condoleezza Rice, Sec. of State, in London, Eng. (Dec. 1, 2008).

<sup>52</sup> This Comment does not advocate torture, however it may be defined. However, the MCA allows for the admissibility of statements obtained through some degree of coercion in particular situations in order to protect national security. See 10 U.S.C. § 948r(c)–(d) (2008). Many are opposed to this section of the MCA as some suggest it may promote torture and kangaroo courts. See, e.g., Edward M. Gomez, *Bush Signs Torture Bill; Americans Lose Essential Freedom*, S.F. GATE, Oct. 17, 2006, [http://www.sfgate.com/cgi-bin/blogs/sfgate/detail?blogid=15archive/&entry\\_id=9952](http://www.sfgate.com/cgi-bin/blogs/sfgate/detail?blogid=15archive/&entry_id=9952) (“By signing into law the Military Commissions Act of 2006, Bush has made it legal for the C.I.A. to continue operating torture facilities in undisclosed, foreign countries . . .”). However, the evidentiary exception may be necessary for a fair trial, and may also benefit the defense. See Ruling on Motion to Suppress Statements Based on Coercive Interrogation Practices, *supra* note 44, at 15–16. In fact, the coercive measures Hamdan complained about were only used in response to his misbehavior and unwillingness to cooperate. See *id.* at 15.

<sup>53</sup> Some evidence obtained by coercion was allowed after looking at the totality of the circumstances and the interests of justice, while other evidence was excluded. Ruling on Motion to Suppress Statements Based on Coercive Interrogation Practices, *supra* note 44, at 15.

hard to criticize the commissions as “Kangaroo Courts” in light of Hamdan’s minimal sentence.<sup>54</sup>

That being said, changes must be made because commissions are far from perfect. The rest of this Comment is devoted to addressing an area of change necessary to the MCA, namely the current sentencing rules and guidelines.

## II. POLICIES AND FAULTS BEHIND THE MCA AND ITS SENTENCING GUIDELINES

On October 17, 2006, President Bush signed the MCA.<sup>55</sup> By creating an extensive set of rules that govern military commissions, Congress tried to ensure that detainees will be given a fair trial.<sup>56</sup> This Part examines the MCA and the goals it is meant to accomplish.

### A. The General Intent Behind the MCA

The general intent of the MCA, as provided by Congress, is to grant enemy combatants with fair trials, but also to protect national security.<sup>57</sup> Section 948b(f) of the MCA reads: “A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Convention.”<sup>58</sup> By calling for fair judicial procedures, this section of the MCA shows the strong intent of Congress to hold fair trials for enemy combatants.<sup>59</sup>

Congressional meetings show the intent to preserve national security and provide fair trials. Senator McConnell was quoted as saying, “[the MCA] is vitally important because this bill protects our national security, it protects classified information, and it protects the rights of defendants.”<sup>60</sup> Senator Graham, a military lawyer for twenty years, said on the congressional record

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<sup>54</sup> Will Dunham, *U.S. Terror Tribunals: Fair Trial or Kangaroo Court*, REUTERS, May 26, 2003.

<sup>55</sup> Press Briefing, Dep’t of Defense, New Military Commissions Rules (Jan. 18, 2007), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3868>.

<sup>56</sup> *Id.* (“The act and the procedures contained in this manual will ensure that alien unlawful enemy combatants who are suspected of war crimes and other -- and certain other offenses are prosecuted before regularly constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized people.”).

<sup>57</sup> DEP’T OF DEFENSE, FACT SHEET, *supra* note 18; see generally 152 CONG. REC. S10354 (2006).

<sup>58</sup> 10 U.S.C. § 948b(f) (2008).

<sup>59</sup> 152 CONG. REC. S10354, (2006) (statement of Sen. McConnell).

<sup>60</sup> *Id.*

about the MCA, “[m]y goal is to render justice to the terrorists, even though they will not render justice to us.”<sup>61</sup>

If the intent behind the MCA is clearly to protect national security while preserving fundamental liberties, then it naturally follows that the goal in sentencing should be the same. However, Congress has made sentencing under the MCA ambiguous.

B. Intent behind the Sentencing Guidelines in the MCA: The Policy and Intent behind Allowing Judges Great Discretion When Sentencing Convicted Terrorists

The MCA and Chapter X of the Manual for Military Commissions (hereinafter MMC) provide judges with fairly loose sentencing procedures and principles and, as such, judges have wide discretion in deciding how to sentence a convicted enemy combatant.<sup>62</sup> In general, the MCA is in place to provide basic guidelines for sentencing,<sup>63</sup> while the MMC deals with the specifics of sentencing procedures.<sup>64</sup>

1. Sentencing Guidelines and Safeguards: How the MCA and MMC Impose Safeguards to Prevent Abuse of Discretion

As it appears, the MCA and MMC provide only minimal guidelines that commissions must follow when sentencing. In addition to the minimal procedural requirements discussed below, the MMC generally allows commissions to sentence any way they deem fit after hearing aggravating and mitigating factors.<sup>65</sup> Rule 1002 of the MMC reads: “Subject to the limitations in this manual . . . the sentence to be adjudged is a matter *within the discretion* of the military commission.”<sup>66</sup> As it appears, so long as a commission stays within the bounds of the sentencing limits provided by 10 U.S.C. section 950v,<sup>67</sup> then its sentence shall be considered legitimate.

While there is much discretion given to the commission in sentencing, the MCA and MMC may provide procedural

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<sup>61</sup> *Id.* (statement of Sen. Graham).

<sup>62</sup> U.S. DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS, pt. II, ch. X (2007), available at <http://www.defenselink.mil/news/MANUAL%20FOR%20MILITARY%20COMMISSIONS%202007%20signed.pdf> [hereinafter MMC].

<sup>63</sup> See 10 U.S.C. § 948d(d) (Supp. 2008) (“A military commission under this chapter may . . . adjudge any punishment not forbidden by this chapter, including the penalty of death when authorized under this chapter or the law of war.”); see also *id.* § 949m(a)–(c).

<sup>64</sup> See MMC, *supra* note 62, at R. 1001, 1006–07, 1009–11.

<sup>65</sup> *Id.* at R. 1002.

<sup>66</sup> *Id.* (emphasis added).

<sup>67</sup> 10 U.S.C. § 950v (Supp. 2008) (providing a list of crimes punishable by military commissions, and the maximum punishment that may be given for each crime).

safeguards to combat an abuse of discretion. First, a minimum of two-thirds of the commission's members are to determine the convict's sentence.<sup>68</sup> This provision helps keep discretion in check by taking the power from one single judge and spreading it to an entire panel. Another safeguard allows the "Convening Authority"<sup>69</sup> of the commission to reduce any sentence that may have been handed down by the commission.<sup>70</sup> Again, this is another way to check the discretion of a commission as it allows the reduction of an overly harsh sentence.

Finally, once convicted, a defendant may appeal the sentence to the Court of Military Commission Review, then to the United States Court of Appeals for the District of Columbia, and finally to the Supreme Court of the United States.<sup>71</sup> The appellate procedure afforded the detainees is another way to limit the amount of discretion of a military commission.<sup>72</sup>

In general, although some procedures with regard to sentencing are provided in the MCA and MMC, "[t]he broad mandatory maximums . . . stand as the only meaningful substantive restraints on the sentencing discretion of military commissions."<sup>73</sup> Thus, despite minimal safeguards to prevent abuse of discretion, commissions are generally free to sentence as they please.

## 2. Intent Behind Sentencing in the MCA

The primary goal of sentencing in military commissions should be no different than the goal of the MCA; to enhance the protection of the United States while preserving fundamental notions of justice for the detainees.<sup>74</sup> However, the lack of

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<sup>68</sup> *Id.* § 949m(a).

<sup>69</sup> The Convening Authority is the one who decides to prosecute certain charges. The Convening Authority also appoints the Chief Judge of the Military Commissions Trial Judiciary. DEP'T OF DEFENSE, FACT SHEET, *supra* note 18.

<sup>70</sup> 10 U.S.C. § 950b(c)(2)(C) (Supp. 2008). The MCA is similar to the Federal Rules of Criminal Procedure in this respect. *See* FED. R. CRIM. P. 35 ("Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.").

<sup>71</sup> 10 U.S.C. §§ 950c, 950f, 950g (2008); *see also* Press Briefing, Dep't of Defense, *supra* note 55.

<sup>72</sup> The Federal Rules of Criminal Procedure allow for an appeal from the district court to the appellate court and then to the Supreme Court, while the rules in the MCA allow for three appeals and review by the convening authority. *Compare* FED. R. APP. P. 3 and SUP. CT. R. 10 with 10 U.S.C. §§ 950b, 950c, 950f, 950g (2008).

<sup>73</sup> Note, *Laser Beam or Blunderbuss?: Evaluating the Usefulness of Determinate Sentencing for Military Commissions and International Criminal Law*, 120 HARV. L. REV. 1848, 1855–56 (2007) [hereinafter *Laser Beam or Blunderbuss?*]. This note puts forth the notion that proportionality and crime control are other policies behind the sentencing discretion given to commissions. *See id.* at 1862–64.

<sup>74</sup> *See* DEP'T OF DEFENSE, FACT SHEET, *supra* note 18.

information provided by Congress makes it difficult for a commission to determine exactly what to aim towards when sentencing.

On one hand, there is the theory that, because the MCA was created to protect national security and to put dangerous terrorists behind bars,— *the main* intent was to provide for harsh sentences.<sup>75</sup> For example, a death sentence for a non-violent crime such as spying<sup>76</sup> could promote national security through deterrence and incapacitation.<sup>77</sup> However, while the death penalty is allowed under the MCA and MMC,<sup>78</sup> and has traditionally been allowed within other military commissions,<sup>79</sup> the strict procedural requirements for enforcing the death penalty make it an unlikely sentence.<sup>80</sup> An example of this was displayed in the recent case of Ali Hamza Ahmad Suliman al Bahlul, a high-level Al Qaeda operative that was convicted, but only sentenced to life in prison.<sup>81</sup> If he was not given the death penalty under the current MCA, it is hard to imagine that any terrorist will be.

If Congress had intended for the harshest sentence possible to be handed out after a conviction, it most certainly would have stated so. Further, military commissions do not seem to be following the goal of promoting national security, as the only two cases decided did not grant the harshest sentence that could be imposed: (1) al Bahlul was not sentenced to death, but rather life in prison;<sup>82</sup> and (2) Hamdan was sentenced to effectively five months in prison.<sup>83</sup> In addition, a third case was settled before trial, and the detainee was released with almost no punishment.<sup>84</sup>

On the other hand, Congress surely did not provide that a commission grant light sentences in order to preserve fundamental principles of justice. While the non-use of the death penalty in recent cases may show intent to preserve fundamental principles of justice, Congress did in fact call for the death

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<sup>75</sup> See *Laser Beam or Blunderbuss?*, *supra* note 73, at 1862–63.

<sup>76</sup> See 10 U.S.C. § 950v(b)(27) (2008).

<sup>77</sup> See *Laser Beam or Blunderbuss*, *supra* note 73, at 1863.

<sup>78</sup> MMC, *supra* note 62, at R. 1004.

<sup>79</sup> CUTLER, *supra* note 24, at 15.

<sup>80</sup> See MMC, *supra* note 62, at R. 1004.

<sup>81</sup> Al Bahlul also contributed seriously to September 11. Further, al Bahlul made propaganda and training videos for al Qaeda and even volunteered to be a September 11th hijacker. See Charge Sheet of al Bahlul, *supra* note 7. Even after being convicted, al Bahlul was still not sentenced to death. McFadden, *supra* note 4.

<sup>82</sup> McFadden, *supra* note 4.

<sup>83</sup> See Glaberson, *supra* note 4.

<sup>84</sup> McFadden, *supra* note 4 (“A third prisoner, Australian David Hicks, reached a plea agreement that sent him home to serve a nine-month prison sentence.”).

penalty upon conviction of certain crimes.<sup>85</sup> While the MCA provides safeguards to help avoid an abuse of discretion, these safeguards do not prevent the imposition of the harshest sentence possible. The commission is to take into account all aggravating and mitigating factors and grant a just sentence.<sup>86</sup> As such, any given commission can grant a harsh or light sentence. Thus, depending on the mood of a commission on any given day, a convicted may be sentenced to death if the crime calls for it.

Further, Congress did not explicitly state what a commission should keep in mind when determining a sentence, and as such, Congress has granted wide discretion to commissions and provided them with little sentencing guidance.<sup>87</sup> For example, the MMC through its sentencing guidelines advocates that the goal in sentencing is to punish the defendant in a way that trial counsel sees fit<sup>88</sup>—this shows the clear intent of Congress to allow the commission to punish as they please. Whether it is to promote national security or to preserve fundamental rights of the convicted, a military commission's sentence should conform to some type of standard. The next section examines the practical problems created from ambiguous sentencing guidelines that provide a large amount of discretion to military commissions.

### III. PRACTICAL PROBLEMS CREATED BY MCA SENTENCING GUIDELINES

Once the MCA was applied at trial, problems surfaced that were not anticipated when the MCA was enacted, particularly in dealing with sentencing. It appears that ambiguous sentencing requirements created some confusion in military commissions. Further, these problems are harder to remedy as the MCA has rarely been used.<sup>89</sup> Thus, there is minimal precedent to follow.

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<sup>85</sup> See generally 10 U.S.C. § 950v (2008) (providing a list of all crimes that a detainee can be charged with and the possible sentences that may accompany a conviction).

<sup>86</sup> See MMC, *supra* note 62, at R. 1001.

<sup>87</sup> See *Laser Beam or Blunderbuss?*, *supra* note 73, at 1856 (“Because the commissions face hard limits only at the margins, these conditions can be described as ‘bounded discretion.’”).

<sup>88</sup> MMC, *supra* note 62, at R. 1001(g) (providing that trial counsel can argue various different punishment theories that should be applied).

<sup>89</sup> See Glaberson, *supra* note 4.

A. Time Held Counts Towards Time Served: The Application of the MCA to Hamdan and the Unfortunate Confusion that Ensued

While it is clear that Congress gave full authority to sentence convicted terrorists via military commissions,<sup>90</sup> Congress provided ambiguous guidelines and procedures for sentencing.<sup>91</sup> Naturally, when the MCA was applied for the first time, problems surfaced. One such problem was that of administrative credit.<sup>92</sup> Administrative credit is the ruling of a court that grants pre-trial time held in prison toward the sentence given; it is a way of reducing a convict's sentence.<sup>93</sup> Administrative credit is currently allowed under the Federal Criminal Justice system in certain situations.<sup>94</sup> The question then becomes, should detainees brought to trial via military commissions be entitled to administrative credit? The rules and procedures in the MCA do not provide an answer to that question.

When Hamdan was sentenced to five and a half years in prison the commission granted administrative credit to count towards his sentence.<sup>95</sup> Effectively, his sentence of five and a half years was reduced to roughly five months, and, in November 2008, he was released to Yemen to serve out the rest of his sentence.<sup>96</sup> Immediately following the sentence, the government filed a motion regarding the issue of administrative credit, requesting that the commission be reconvened, told of the error of

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<sup>90</sup> See 10 U.S.C. § 948b(a) (2008).

<sup>91</sup> See *supra* notes 65, 87–88 and accompanying text.

<sup>92</sup> See Corrected Government Motion for Reconsideration, *supra* note 5, at 1.

<sup>93</sup> See Michael L. Kanabrocki, *Revisiting United States v. Allen: Applying Civilian Pretrial Confinement Credit for Unrelated Offenses Against Court-Martial Sentences to Post-Trial Confinement Under 18 U.S.C. § 3585(b)(2)*, 2008 ARMY LAW. 1, 1 (Aug. 2008).

<sup>94</sup> 18 U.S.C. § 3585(b) (2008) (“A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences”). Administrative credit in the federal system can be granted in two circumstances: “(1) as a result of the offense for which the sentence was imposed; or (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed.” *Id.*

<sup>95</sup> Markon & White, *supra* note 6. The commission granted administrative credit claiming they had the authority to do so. However, the government claims that nothing in the MCA or MMC allows for the granting of administrative authority. Corrected Government Motion for Reconsideration, *supra* note 5, at 1. Although the commission did not state where they drew the authority to grant administrative credit, it is possible that the commission believed they had authority to grant administrative credit via case precedent. See *United States v. Allen*, 17 M.J. 126, 128 (C.M.A. 1984) (granting administrative credit). The Court of Military Appeals in *Allen* was the first military court to grant administrative credit. Kanabrocki, *supra* note 93, at 1.

<sup>96</sup> Josh White & William Branigin, *Hamdan To Be Sent To Yemen*, WASH. POST, Nov. 25, 2008, at A1.

administrative credit, and to issue a new sentence.<sup>97</sup> The government contended that Hamdan was held pre-trial as an enemy combatant and as such he should not be granted administrative credit.<sup>98</sup> Judge Allred and the military commission refused to reconsider the sentence without explanation.<sup>99</sup> Thus, the issue of administrative credit was never decided.

Failure to resolve the dispute over administrative credit creates several other problems. First, the clash between prosecutor and commission is sure to arise again and, depending on the military commission, the result may be different—that is, administrative credit may not be granted. Thus, the lack of standards will create inconsistent results, which will lead to instability for military commissions.<sup>100</sup>

Second, Congress has not taken action to quell the confusion. Congress was granted the authority by the Supreme Court to write the MCA and rules that govern commissions.<sup>101</sup> The idea of administrative credit may have been foreseeable to Congress, as there is a federal statute counterpart<sup>102</sup> and previous military cases have granted administrative credit.<sup>103</sup> Yet Congress did not explicitly state whether granting administrative should be allowed. As stated above, both the prosecution and the commission have valid arguments for and against granting

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<sup>97</sup> Essentially the government argued that Hamdan was held as an enemy combatant pursuant to the Geneva Convention and as such his time held at Guantanamo is a separate issue from the sentence he was given for the crimes he committed. Corrected Government Motion for Reconsideration, *supra* note 5, at 1; Posting of Lyle Denniston to SCOTUSBLOG, <http://www.scotusblog.com/wp/?s=hamdan> (Oct. 19, 2008, 4:01 PM).

<sup>98</sup> Corrected Government Motion for Reconsideration, *supra* note 5, at 1.

<sup>99</sup> It appears that Commission Judge Allred read the briefs and did not provide a reason as to why the motion was refused. See Ruling on Motion for Reconsideration and Sentencing, *United States v. Hamdan*, [full case citation] (court & year) (docket no.), available at, <http://www.scotusblog.com/wp/wp-content/uploads/2008/10/hamdan-sentence-order-10-29-08.pdf>; Posting of Lyle Denniston to SCOTUSBLOG, <http://www.scotusblog.com/wp/?s=hamdan> (Oct. 30, 2008, 3:14 PM).

<sup>100</sup> Although dealing with a different set of military courts and problems, commissions that tried World War II criminals faced similar problems with inconsistent results. Eventually, it was the inconsistencies that led to the undermining of the legitimacy of the commissions. Durwood "Derry" Riedel, *The U.S. War Crimes Tribunals at the Former Dachau Concentration Camp: Lessons for Today?*, 24 BERKELEY J. INT'L L. 554, 575 (2006).

<sup>101</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 653 (2006) (Kennedy, J., concurring in part). Although the Supreme Court found military commissions recently set up by the President Bush unconstitutional, it invited Congress to make a set of rules that govern military commissions; thus the MCA was enacted. Regina Fitzpatrick, *Hamdan v. Rumsfeld: Implications for the Geneva Conventions*, 20 HARV. HUM. RTS. J. 339, 347 (2007).

<sup>102</sup> 18 U.S.C. § 3585(b) (2008).

<sup>103</sup> *United States v. Allen*, 17 M.J. 126, 129–29 (C.M.A. 1984).

administrative credit to detainees but, until a rule is created, confusion will continue to ensue and resources will be wasted. As a result, sentences will continue to lack legitimacy and validity.

Finally, this dispute creates embarrassment for the United States nationally and aboard as the inter-branch conflict remains unresolved. Clearly, the dispute over administrative credit must be solved. However, it is not the only problem that exists with regard to sentencing. The commissions currently have too much discretion in sentencing, as discussed in the next Section.

#### B. Confusion and Uncertain Results: How Lack of a Guiding Principle led to Serious Problems with Regard to Sentencing

While a lack of rules led to an obvious conflict between different branches of government, the amount of discretion given to a commission combined with minimal guiding principles created another set of problems that may not be readily apparent. Uncertain and inconsistent sentences can lead to serious problems that undermine the validity of military commissions.<sup>104</sup> A goal of most sentencing schemes is to provide just sentences. For example, one goal of the United States Sentencing Commission<sup>105</sup> is to “provide certainty and fairness in meeting the *purposes* of sentencing.”<sup>106</sup> While a goal of military commissions may be to provide fairness in sentencing,<sup>107</sup> there is no stated “purpose” of sentencing.

The ability of the commission to sentence not based on a definitive standard will create confusion and uncertain results. One problem created by such discretion given to commissions is those attorneys, defendants, the prosecution, the government and even the public have little idea about how a convicted individual may be sentenced. For example, when Hamdan was sentenced,<sup>108</sup> the prosecution was disappointed;<sup>109</sup> President

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<sup>104</sup> When Congress was creating new federal sentencing laws, one aim was to rid the system of inconsistent sentences. Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 98 (1988) (“The legislators were concerned that disparities generated disrespect for the law . . .”).

<sup>105</sup> The United States Sentencing Commission is an independent agency that helps develop sentencing guidelines for federal courts, studies sentencing issues and proposes solutions. U.S. SENTENCING COMM’N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1–2 (2005), available at [http://www.ussc.gov/general/USSCoverview\\_2005.pdf](http://www.ussc.gov/general/USSCoverview_2005.pdf).

<sup>106</sup> 28 U.S.C. § 991(b)(1)(B) (2008) (emphasis added).

<sup>107</sup> See U.S. DEPT OF DEFENSE, FACT SHEET, *supra* note 18.

<sup>108</sup> Glaberson, *supra* note 4.

<sup>109</sup> While the prosecution sought thirty years, they were not too upset by the lighter sentence handed down to Hamdan as they were hopeful that the eighty other detainees to come to be tried would receive harsher sentences. Alan Gomez, *Bin Laden Driver Gets 5 ½-Year Sentence*, USA TODAY, Aug. 7, 2008, at A1. However, one prosecutor, John

Bush and the Pentagon were pleased;<sup>110</sup> Hamdan was thrilled with the sentence;<sup>111</sup> and the public was seemingly unsure as to the appropriate reaction toward the sentence he received.<sup>112</sup> However, a different commission might grant life in prison to a detainee convicted of the same charge as Hamdan.<sup>113</sup> One consequence of this uncertainty is that it will be harder for both sides to plea bargain as neither side will be able to gauge the strength of their case.<sup>114</sup> This uncertainty further creates chaotic and disorganized results with no real pattern, which reduces the legitimacy of the MCA.

Inconsistent results come about when each commission is allowed to sentence as they please. For Example, Ali Hamza Ahmad Suliman al Bahlul was charged and convicted of conspiracy and sentenced to life in prison.<sup>115</sup> According to the MMC and MCA, al Bahlul could have been sentenced to death,<sup>116</sup> but the commission decided against it. Currently, in a joint trial, five co-conspirators involved in the September 11 attacks<sup>117</sup> are likely to be convicted and sentenced for the same crimes that al Bahlul committed. However, there is nothing in the MCA or MMC to stop this commission from sentencing the co-conspirators to death instead of life in prison. Clearly every case is different; each has its own set of facts and, as such, each

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Murphy, was quoted as saying: "Your sentence should say the United States will hunt you down and give you a harsh but appropriate sentence if you provide material support for terrorism." Glaberson, *supra* note 4.

<sup>110</sup> The White House and the Pentagon seemed pleased with the sentence as it demonstrated the fairness of the commissions when Hamdan was given a seemingly mild sentence. Jamie McIntyre, *Bin Laden's Former Driver Guilty in Terror Trial*, CNN.com, Aug. 6, 2008, <http://www.cnn.com/2008/CRIME/08/06/hamdan.trial/index.html>.

<sup>111</sup> Hamdan appeared apologetic and looked forward to his release. Markon & White, *supra* note 6.

<sup>112</sup> See Glaberson, *supra* note 4; McIntyre, *supra* note 110.

<sup>113</sup> See 10 U.S.C. § 950v(b)(25) (Supp. 2008) (providing that one who gives material support or resources for terrorism "may be punished as a military commission under this chapter may direct.").

<sup>114</sup> An inability to plea bargain can lead to a waste of resources because many more cases are likely to go to trial. Further, military commissions may become flooded with detainees as trials in general will take longer. Steven E. Walburn, *Should the Military Adopt an Alford-Type Guilty Plea?*, 44 A.F. L. REV. 119, 120-22 (1998).

<sup>115</sup> McFadden, *supra* note 4. Al Bahlul was given a life sentence, so the defect in administrative credit was not present. See *id.*

<sup>116</sup> See 10 U.S.C. § 950v(b)(28) (Supp. 2008) ("Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death"); see also MMC, *supra* note 62, at IV-21 to 22.

<sup>117</sup> Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarek bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi, are all being charged with conspiracy for their acts leading up to and on September 11. See generally September 11 Co-Conspirators Charge Sheets, available at <http://www.defenselink.mil/news/commissionsCo-conspirators.html> (follow "Referred Charges" hyperlinks).

sentence should reflect those differences. However, the case of al Bahlul is factually similar to that of the five co-conspirators of September 11. A sentence of death for the five co-conspirators would be an inconsistent result, creating instability in military commissions.

Although there may be some advantages to allowing such discretion,<sup>118</sup> ensuring that military commissions are legitimate should be the ultimate goal. The uncertainty and inconsistent outcomes that may result will lead to a perception that undermines the validity of the courts. The final section of this Comment examines possible solutions to the problems outlined above.

#### IV. TWO RULES TO IMPROVE THE VALIDITY OF MILITARY COMMISSIONS

The overall goal of Congress should be to improve the legitimacy of the MCA and military commissions such that, as they continue to go forward, the United States remains protected, while at the same time detainees are given fair trials. Incident to this goal is the improvement of the sentencing guidelines in the MCA.

##### A. Fixing the Immediate Problem: Administrative Credit Should be Allowed

Congress should expressly authorize military commissions to grant administrative credit under certain circumstances. In other words, a convict might be entitled to deduct time already served if a commission deems it appropriate. In order to preserve the goals behind the MCA—preserving national security while protecting a right to a fair trial—administrative credit must be granted in certain situations.

First, as discussed above, military commissions currently have the authority to grant administrative credit. According to common law and precedent, the military has authority to grant administrative credit.<sup>119</sup> Further, administrative credit may be granted in federal criminal cases in certain situations under 18 U.S.C. section 3585(b).<sup>120</sup> While there is also authority to support

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<sup>118</sup> See *Laser Beam or Blunderbuss?*, *supra* note 73, at 1864 (“A high tolerance for variability in sentencing may help the commissions respond to the shifting demands of the war on terrorism.”).

<sup>119</sup> See *United States v. Allen*, 17 M.J. 126, 129 (C.M.A. 1984).

<sup>120</sup> 18 U.S.C. § 3585(b) (2008).

denying administrative credit,<sup>121</sup> the practical effects of allowing for such credit should persuade Congress to do so.

A rule allowing for administrative credit will only apply to a small number of cases. Obviously, administrative credit will not apply in all cases, as detainees such as al Bahlul, who have committed the most egregious acts, will undoubtedly serve life in prison.<sup>122</sup> Also, despite the ability to grant administrative credit, it must not be an absolute guarantee and only limited to certain situations.<sup>123</sup> Because of the small number of cases to which administrative credit may be limited, the release of potentially dangerous terrorists following a reduced sentence becomes less likely and, as such, national security will still be preserved.

Every person tried by a military commission will likely have been detained pre-trial. A law allowing for administrative credit protects the fundamental rights of detainees by acting as a safeguard against unlawful pre-trial detainment. Allowing the application of administrative credit would act as one way<sup>124</sup> to release detainees who may not have committed serious crimes but have been held for a long time. Hamdan was likely granted administrative credit because the commission deemed he had already served his sentence.<sup>125</sup> The ability to grant administrative credit allows a commission to look at the facts of a particular case—why and how long a detainee has been held—and allows for application of a just sentence. As such, a rule allowing for administrative credit also promotes justice.

The main objection to administrative credit is that pre-trial detention is independent of the crime committed and resulting sentence and thus should not count toward the sentence.<sup>126</sup>

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<sup>121</sup> The government contends that the Geneva Convention allows for the detainment of enemy combatants until the current conflict is over and, thus, the detainees are held independent of the charges against them and should be forced to serve the full sentence given to them. See Corrected Government Motion for Reconsideration, *supra* note 5, at 3–5.

<sup>122</sup> See McFadden, *supra* note 4.

<sup>123</sup> For example, 18 U.S.C. section 3585(b) (2008) allows administrative credit only where a detainee is held “(1) as a result of the offense for which the sentence was imposed; or (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed.”

<sup>124</sup> Another way enemy combatants can challenge their detainment is through habeas corpus review. *Boumediene v. Bush*, No. 06-1195, slip op. at 1–2 (U.S. June 12, 2008).

<sup>125</sup> Although the commission did not state the reasons why it granted administrative credit, it clearly believed Hamdan had been detained for too long. See Corrected Government Motion for Reconsideration, *supra* note 5, at 1.

<sup>126</sup> The prosecution’s argument is that the detainees were held as enemy combatants and their detainment had nothing to do with the crimes for which they were ultimately charged. *Id.* at 6. See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (“The United States may detain, for the duration of these hostilities, individuals legitimately

Traditionally, in order to be eligible for administrative credit, a person must have been detained in connection with their crime or any other charge they were arrested for after their original crime.<sup>127</sup> Clearly, it can also be argued that the reason these detainees are held is because they committed the crimes for which they are ultimately charged. As such, they were detained in connection with their crime and thus should be granted administrative credit.

Because there is authority to grant administrative credit, and the practical effects of allowing administrative credit are crucial in providing stability for military commissions, a law permitting administrative credit in certain situations, when the commission deems it necessary, must be enacted. The next section discusses a possible solution to the problems caused by providing commissions with wide discretion without any clear sentencing guidelines.

#### B. Fixing the Guidelines: Commissions Should Implement the Federal Sentencing Guidelines

The main problem with the large amount of discretion given to commissions is the uncertainty and inconsistency of the results that have developed. If the goal of military commissions is to ensure fair trials while preserving national security, the current arbitrary sentencing procedures will not satisfy either objective. The easiest and most effective change would be to model the commission sentencing guidelines after the federal sentencing guidelines.<sup>128</sup> A sentencing scheme modeled after the Federal Rules of Sentencing would be effortless to create, and

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determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'")

<sup>127</sup> See 18 U.S.C. § 3585(b) (2008). For an analysis of different types of sentencing credit with respect to the military, see Michael G. Seidel, *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application*, 1999 ARMY LAW. 1 (1999).

<sup>128</sup> The federal sentencing guidelines are generally governed by the Sentencing Reform Act of 1984, part of which is codified at 18 U.S.C. § 3553 (2008). Pub. L. No. 98-473, 98 Stat. 1987, 2017 (1984). These guidelines were passed in response to many of the same problems in federal court that current military commissions are facing—inconsistent results and arbitrary sentencing. Weigel, *supra* note 104, at 98. Two reasons the federal sentencing guidelines were established were to “incorporate the purposes of sentencing (i.e., just punishment, deterrence, incapacitation, and rehabilitation),” and to “provide certainty and fairness by . . . avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct.” U.S. SENTENCING COMM’N, *supra* note 105, at 1. Another goal of the sentencing guidelines was to “increase the certainty and severity of punishment by eliminating parole and increasing sentencing severity for some crimes.” See U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 38 (2004), available at [http://www.ussc.gov/15\\_year/15\\_year\\_study\\_full.pdf](http://www.ussc.gov/15_year/15_year_study_full.pdf).

could be implemented relatively quickly without additional delays for detainees who are awaiting trial.

Application of the federal sentencing guidelines will surely provide stability and thus improve the legitimacy of the MCA. Essentially, the federal guidelines provide judges with sentencing ranges that account for the seriousness of the crime and the defendant's past criminal record.<sup>129</sup> Generally, the guidelines provide for sentences that may be consistently applied, and were created to remedy the exact problem that military commissions are having—inconsistent and arbitrary outcomes that result from too much discretion.<sup>130</sup> The use of the same guidelines in every military commission removes the threat of a panel of military members sentencing a “low level terrorist” such as Hamdan to death, and forces each commission to abide by the sentencing rules. At the same time, some judicial discretion is preserved as the commissions will look at the detailed facts of every case and determine which sentence to apply much like federal judges do.<sup>131</sup>

By following the federal sentencing guidelines, fairness and protection of detainees' rights will be preserved. First, the federal guidelines are part of a proven system that has been in place for decades.<sup>132</sup> The use of this established system will quiet doubters who believe that commissions are “Kangaroo Courts.”<sup>133</sup> Further, the use of the guidelines allows Congress to determine the appropriate sentence for a particular crime, rather than allow a military commission to do so on a case-by-case basis. If a convict falls within a sentencing range that is indeed too harsh for one reason or another, the United States Supreme Court has found that “while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”<sup>134</sup> As such, a commission can still ensure that a convict is given the sentence he deserves.

One objection to the use of the guidelines is that sentencing flexibility will be removed and, essentially, Congress will be making the sentencing decision.<sup>135</sup> However, if the military

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<sup>129</sup> U.S. SENTENCING COMM'N, *supra* note 105, at 2. The sentencing range is determined by the point on the sentencing table where the criminal record and the seriousness of the crime intersect. *Id.*

<sup>130</sup> *Id.* at 1–2.

<sup>131</sup> Weigel, *supra* note 104, at 101.

<sup>132</sup> U.S. SENTENCING COMM'N, *supra* note 105, at 1–2.

<sup>133</sup> See Dunham, *supra* note 54.

<sup>134</sup> United States v. Booker, 543 U.S. 220, 264 (2005).

<sup>135</sup> See Weigel, *supra* note 104, at 105 (“It is far better to have an independent judge determine the appropriate sentence in any given case . . . than to turn that problem over to a body which, in the end, acts as a Washington-headquartered restraint upon

commissions are going to succeed, they need a stable foundation to ensure their legitimacy. The use of these guidelines by military commissions will institute a proven system that provides consistency. And while one goal of the guidelines is to impose harsher sentences,<sup>136</sup> the use of the federal guidelines coupled with the allowance of administrative credit will ensure that a convicted detainee is given a fair and just sentence.

#### CONCLUSION

Even today, after roughly 233 years, new rules are routinely created for United States criminal courts. Courts simply cannot be created with one act from Congress; they need time to grow and develop. While Congress tried to foresee many problems regarding the MCA and military commissions, they were not able to eliminate every problem. And even though problems appeared in the MCA after *Hamdan*, current military commissions must continue to be used as they are the most practical system in place. Military Commissions must continue to improve their validity, they must continue to grow. Changes regarding sentencing must be made in order to improve the legitimacy of military commissions.

A system resembling the Federal Guidelines will provide certain and non-arbitrary results. While some believe that the guidelines will provide overly harsh sentences, allowing administrative credit may effectively reduce sentences while preserving some discretion for the commissions. As such, each detainee will receive the sentence he deserves and the United States will remain protected.

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judgments best determined locally and individually.”).

<sup>136</sup> See U.S. SENTENCING COMM’N, *supra* note 128, at 38.